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No. 99-1908

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IN THE

Supreme Court of the United States

NOV 13, 2000

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR U.S. ENGLISH AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress intended to create a private right of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

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F. von Hayek, *The Road to Serfdom* (1944) 22

S. von Pufendorf, VII *De Jure Naturae et Gentuim: Libri Octo* (1688) (C.H. & W.A. Oldfather trans. 1934) 22

"Thomas Jefferson's Prayer for the Nation," reprinted in The Heritage Foundation Quarterly Report (Spring '99) *at* www.heritage.org/ membership/ hmn/ Spring99/ publications.html. 20

N. Webster, *American Dictionary of the English Language* (1828)..... 21

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INTEREST OF AMICUS CURIAE[1]

U.S. English is a national, non-partisan, non-profit, citizens' action group dedicated to preserving the unifying and empowering roles of a common language in America. Current membership exceeds 1.4 million nationwide.

U.S. English was established in 1983 by the Honorable S.I. "Sam" Hayakawa, noted educator and linguist, former United States Senator from California, and himself an immigrant. Senator Hayakawa's overriding concern was to ensure that English would continue to serve as an integrating

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters of such consent have been filed with the Clerk of the Court.

force among our nation's many ethnic and linguistic groups, and that it would remain a vehicle of opportunity for new Americans. In his own words, "English is the key to full participation in the opportunities of American life."

Today U.S. English consists of two independent entities: U.S. English, Inc., a tax-exempt 501(c)(4) organization, which advocates the interests of its supporters before federal and state legislatures and agencies; and U.S. English Foundation, Inc., a tax-exempt 501(c)(3) organization which disseminates information, sponsors educational programs, represents interests of official English advocates before state and federal courts, and conducts research on language issues.

U.S. English supporters recognize the importance of preserving English as our common language for our national unity, equal opportunity, and economic advancement.

SUMMARY OF ARGUMENT

The Court should reverse the holding below in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), which otherwise would create a private right of action that is both unnecessary and contrary to the congressionally established administrative enforcement scheme in Title VI. The 11th Circuit's holding that Alabama's official English drivers license testing policy violates federal law is at odds with a myriad of federal statutes and regulations that recognize, either directly or indirectly, that English is the official language of the United States. Moreover, the 11th Circuit's holding that "Title VI flatly prohibits . . . English language policies that cause disparate impact on the basis of national origin" (citing *Lau v. Nichols*, 414 U.S. 563 (1974)) contorts this Court's ruling in *Lau*, the underlying premise of which was that American citizens who do not understand English need to be taught English first in order to participate fully in public schools. Finally, the holding below that when "Spending Clause legislation functions as a quasi-contract between Congress

and the States . . . , agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose," is contrary to the rules of construction applied in *United States v. Heth, 7* U.S. (3 Cranch) 399 (1806), and *Vermont Agency of Natural Resources v. United States*, 120 S. Ct. 1858 (2000), resolving ambiguities against Congress.

ARGUMENT

I. JUDICIAL CREATION OF A PRIVATE RIGHT OF ACTION TO ENFORCE TITLE VI DISPARATE IMPACT REGULATIONS IS UNNECESSARY AND CONTRARY TO THE CONGRESSIONALLY ESTABLISHED ENFORCEMENT SCHEME.

Whether a private right of action to enforce a statute will be recognized is ultimately a matter of congressional intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). *Amicus* offers four reasons why Congress would not have intended to allow for a private right of action to enforce Title VI disparate impact regulations: it is unnecessary, contrary to the administrative enforcement scheme established by Congress, contrary to the informal resolution process established by agency regulation to promote the congressional goal of voluntary compliance, and would jeopardize a myriad of English language rules, with which the Code of Federal Regulations is replete.

A. The Elaborate Administrative Scheme In Title VI Itself Obviates a Private Right of Action.

Congress granted Federal agencies the plenary authority both to implement and to enforce the nondiscrimination provision of Title VI of the Civil Rights Act of 1964. Section 602 of Title VI directs each Federal department and agency which provides financial assistance for a program or activity to "effectuate" the nondiscrimination provision in

Section 601 "with respect to such program or activity by issuing rules, regulations, or orders of general applicability" and "to enforce any nondiscrimination requirement by terminating or denying financial assistance to any recipient found to have failed to comply with such requirement, or "by any other means authorized by law."[2] As the Justice Department recognizes, "[p]rimary responsibility for prompt and vigorous enforcement of Title VI rests with the head of each department and agency administering programs of Federal financial assistance."[3] 28 C.F.R. §50.3(b).

While Congress did not authorize private persons to enforce the nondiscrimination provisions of Title VI in the courts, this Court has recognized an implied private right of action under Section 601 for intentional discrimination. See *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 293 (1998) (Stevens, J., joined by Souter, Ginsberg, and Breyer, JJ., dissenting) ("Title VI . . . had been interpreted to include a private right of action [for intentional discrimination]," (citing *Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979)). Two of the five Justices in the *Cannon* majority concurred, disavowing any expansion of private rights of action under Title VI. 441 U.S. at 718 (Rehnquist, J, joined by Stewart, J., concurring). Accordingly, neither was there a majority in *Cannon* nor has there apparently been one since for the proposition that Congress intended a private right of action under Title VI for unintentional discrimination.

The decision of Congress not to provide a judicial remedy for unintentional discrimination by no means leaves

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[2] 42 U.S.C. §2000d-1.

[3] *See Alexander v. Choate*, 469 U.S. 287, 293-94 (1985) ("Title VI . . . delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficient social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.").

individuals without legal recourse. Federal agencies have used their authority under Title VI to allow private persons to file administrative complaints. The U.S. Department of Transportation ("DOT"), for example, provides a complaint and investigation procedure available to private persons: "Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary a written complaint."[4]

This DOT process allows private persons to obtain relief from discriminatory conduct. DOT may cut off financial assistance to a recipient and may direct the recipient to take affirmative steps to remedy the discrimination as a condition of future financial assistance.[5] Private persons may also file a complaint with the Justice Department ("DOJ").[6] Neither Martha Sandoval nor others in her class ever filed a complaint with DOT or DOJ, even though these avenues have always been available to them.

Because of the availability of an administrative enforcement scheme under which a private person may obtain relief, this Court need not create a private right of action to enforce the Title VI disparate impact regulation.[7]

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[4] 49 C.F.R. §21.11(b).

[5] 49 C.F.R. §21.19(f). The only remedy not provided under DOT's Title VI regulations is monetary compensation, but a monetary remedy is also not provided in the statute. In any event, the absence of a money damages remedy in an administrative enforcement scheme does not mean that a private right of action must be inferred.

[6] 28 C.F.R. §42.107(b).

[7] The lower courts have held that there is no private right of action to enforce the grant assurances Congress and the Secretary of Transportation require as a condition of receiving an airport improvement grant under the Airport and Airway Improvement Act, 49 U.S.C. §§47106, 47107, primarily because Congress created an administrative enforcement scheme, under which interested persons may seek redress.

B. A Judicially Created Right of Action Would Improperly Bypass the Conditional Authority Congress Delegated To the Executive.

Allowing a private right of action to enforce the disparate impact regulations promulgated by the U.S. Departments of Transportation and Justice would circumvent the limited authority Congress delegated to the Executive Branch. Although Congress authorized federal agencies to enforce violations of Title VI's ban on discrimination, Congress circumscribed that authority in two respects. First, an agency may find that a grant recipient discriminated on the basis of national origin only after providing notice and an opportunity for a hearing.[8] Second, grants may not be terminated or denied pursuant to such a finding until the agency notifies the House and Senate oversight committees, provides Congress with a full report of "the circumstances and grounds for such action," and waits thirty days to give Congress time to review the report.[9]

These statutory procedures are intended to ensure that an agency's finding of discrimination is well-founded and thoroughly considered. They both afford recipients basic due

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See, e.g., Northwest Airlines, Inc. v. County of Kent, 955 F.2d 1054 (6th Cir. 1992), *aff'd on other grounds*, 510 U.S. 355 (1994); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir. 1986); *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489 (11th Cir. 1985).

[8] 42 U.S.C. §2000d-1. DOT regulations provide that any finding of noncompliance must be made expressly on the record, and must be approved by the Secretary. 49 C.F.R. §§21.13(c)(2), (c)(3), 21.17(e).

[9] 42 U.S.C. §2000d-1; 49 C.F.R. §21.13(c). Moreover, "[n]o action to effect compliance with title VI of the Act by any other means authorized by law shall be taken by this Department until" the Secretary has determined that compliance cannot be secured voluntarily, the recipient is given notice of its failure and the DOT's proposed action, and ten additional days elapse during which further efforts are made at achieving compliance." 49 C.F.R. §21.13(d).

process and allow Congress the opportunity on a timely basis to conduct oversight of DOT's fealty to the intentions of Congress. Allowing private enforcement of Title VI regulations denies Congress the contemporaneous oversight role Congress demanded in Title VI and frustrates several regulatory provisions intended to ensure a fair and sound decision as well as to promote an informal resolution of the matter:

> *Cooperation and assistance.* The Secretary shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.
>
> *Investigations.* The Secretary will make a prompt investigation whenever a . . . complaint, or any other information indicates a possible failure to comply with this part. . . .
>
> *Resolution of matters.* (1) If an investigation . . . indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible.[10]

In this case, DOT provided no assistance or guidance regarding Alabama's compliance with Title VI regulations in the administration of its drivers' tests. At no time after Alabama began administering the tests only in English did DOT provide any notice that Alabama was not in compliance with Title VI or regulations promulgated thereunder. Indeed, other than participating at the Court of Appeals through the Department of Justice, DOT has been silent throughout this proceeding. *A fortiori*, Alabama was not afforded any

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[10] 49 C.F.R. §§ 21.9(a), 21.11 (c), (d).

opportunity informally to work with DOT to resolve any concerns the Department might have.

C. Private Enforcement of Disparate Impact Regulations Would Deny Recipients DOT's Informal Resolution Process.

Before Alabama is called to task for alleged noncompliance with Title VI in administering its driver license tests, it is incumbent on DOT or DOJ in the first instance to evaluate whether Alabama's practice violates Title VI. That neither DOT nor DOJ has done so is not surprising, given the attenuated relationship between DOT's financial assistance to the Alabama Department of Transportation and Alabama's practice of conducting its driver tests only in English.[11] Moreover, this is also not surprising in light of the fact that throughout the Executive Branch of the Federal Government, Executive departments and agencies, most notably DOT and DOJ, require the use of English language in a wide variety of programs and activities.

Even if DOT or DOJ were to conclude that Alabama's practice violated either department's Title VI regulations, Section 601 of the statute itself requires the agency to notify the recipient of the noncompliance and determine whether compliance may be secured voluntarily, before taking any action against the recipient.

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[11] Alabama has questioned whether there is a sufficient nexus between the financial assistance provided the Alabama Department of Transportation and the State's administration of driver tests. Alabama has not received any federal financial assistance in support of the administration of its driver tests. *Cf.* 42 U.S.C. § 2000d-1 ("[S]uch termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found[.]").

Neither DOT nor DOJ has provided Alabama with any guidance whatsoever addressing the administration of any program which conditions a license or permit in furtherance of public health and safety on a person's English language proficiency. Likewise, there is no rule, guidance, or advice questioning the exclusive use of the English language in administering a transportation safety project or program. Appendix C of Part 21 contains a non-exhaustive list of examples illustrating the application of the non-discrimination provisions of Title VI to federally assisted programs of several modal administrations within DOT, including the Federal Highway Administration ("FHA"). The examples pertain to selection of contractors; relocation payments and relocation assistance; access to and use of public accommodations and publicly available services provided to the traveling public and business users (*e.g.*, eating, sleeping, rest, recreation, and vehicle servicing); employment practices on highway construction and other projects; and location, design, or construction of a highway. None of these FHA examples concerns State-administered public safety programs.[12]

Allowing a private right of action that bypasses the congressionally-mandated enforcement scheme deprives grant recipients of the procedural protections contained in the statute and recited above. Moreover, private enforcement of Title VI disparate impact regulations is divorced from the informal agency resolution process. Accordingly, agency efforts at achieving voluntary compliance, which are required under DOT and DOJ regulations, may well not be expended in connection with a private lawsuit. Even if DOT decides to get involved in the litigation, the requirements to seek the approval of the Secretary and to notify Congress are frustrated.

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[12] 49 C.F.R. Part 21, App. C(a)(2).

Private enforcement of Title VI disparate impact regulations would also allow private litigants to pursue enforcement in situations where the federal agency with "[p]rimary responsibility for prompt and vigorous enforcement of Title VI"[13] has elected not to do so. While DOJ may believe that the enforcement of Title VI by "private attorneys general" is a good idea, Congress deputized only departments and agencies, not private persons, to enforce the Civil Rights Act of 1964.[14] Further, there is no apparent control mechanism in Title VI or implementing regulations to ensure that such private attorneys general are not advocating an interpretation or taking an enforcement action contrary to the interests of the granting agency or of the Federal Government generally.

Finally, the carefully conditioned delegation of rulemaking and enforcement authority to Federal agencies, the absence of any express grant of a private cause of action, and the complex nature of disparate impact allegations suggest that Congress intended that Federal agencies would develop expertise and exercise sound judgment to implement Section 602, whether by rulemaking or adjudication.[15]

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[13] 28 C.F.R. § 50.3(b).

[14] The proscription on discrimination in Title VI is in Section 601, which this Court has held prohibits only intentional discrimination. *See Alexander v. Choate*, 469 U.S. at 293 (summarizing opinions in *Guardian Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983)). Disparate impact regulations are agency creatures promulgated under section 602. Even if private enforcement of the statutory ban on intentional discrimination continues to be recognized. *See Cannon v. City of Chicago*, 441 U.S. 677 (1979) (private right of action under Title IX) private enforcement of disparate impact regulations, a far more complicated matter, is unwarranted.

[15] *See Interface Group*, 816 F.2d at 14-15 (Breyer, J.) ("[T]he statute [now codified at 49 U.S.C. §40103(e), prohibiting an exclusive right at an air navigation facility] as a whole provides an administrative and judicial enforcement scheme that suggests at least some Congressional wish for an element of administrative expertise at the enforcement stage, an expertise that tends to be lost when private parties can enforce the statute directly in court.").

D. Judicial Recognition of a Private Right of Action Would Jeopardize Legitimate English Language Requirements, With Which the Code of Federal Regulations Is Replete.

Recognizing a private right of action here would lead to the anomalous result whereby a Federal grant recipient is prohibited from requiring English language proficiency as an element of a public safety program, while the Federal granting agency regularly requires such proficiency in comparable programs. Moreover, the 11th Circuit's decision allowing a challenge to Alabama's practice of conducting regular driver tests in English calls into question a myriad of English language requirements throughout the Code of Federal Regulations.

If this Court agrees with the Court of Appeals that language is a proxy for national origin – a proposition with which *amicus* strongly disagrees – it follows that English language requirements throughout the Executive Branch will be found to have a disparate impact on those who cannot read, write, speak or understand the English language. Whatever codification of *Lau* Congress is thought to have enacted in bilingual education legislation, Congress cannot fairly be said to have intended to invalidate a host of English language requirements imposed by Federal, State, and local governments in furtherance of public health and safety.

For more than two decades after the decision in *Lau* DOJ and other Federal agencies have not seen fit to repeal or relax their own English language requirements. In a small number of discrete areas, as described *infra*, Congress or an Executive agency imposed affirmative obligations to provide for certain bilingual services. But in matters that affect the

public safety English language requirements have essentially remained untouched, because English language proficiency clearly serves the public interest in health and safety.

Heretofore, the risk of invalidating State or local English language requirements was minimal, because the interpretation and enforcement of the disparate impact regulations under Title VI was entrusted to DOJ and the Executive agencies respectively, the very agencies whose body of regulations feature many explicit English language requirements and whose day-to-day dealings with private persons are conducted in English. Moreover, any inclination of an Executive agency to extend the reach of Title VI is subject to mandatory congressional oversight. However, if and when a private right to enforce disparate impact regulations is recognized by this Court, every Federal district court potentially assumes the authority to interpret and to enforce Title VI regulations at the request of private parties.[16]

The proliferation of legal proceedings unleashed by this Court's recognition of a private right of action would likely result in judicial rulings similar to the Court of Appeals opinion in this case flatly at odds with the substantive regulations of both DOJ and DOT. How is it that Alabama's English-language drivers' test is illegal, whereas facility with the English language is a DOT prerequisite to operate an aircraft or commercial motor vehicle, or to serve as an able seaman? How is it that Alabama's English-language drivers' test is illegal, whereas access to U.S. agency rulemaking and adjudicative processes, including those of the Justice

[16] Recently, DOJ issued guidance which approvingly cites the court of appeals decision in this case as a case "outside of the educational context" applying the nondiscrimination provision of Title VI to English-only rules and practices. 65 Fed. Reg. 50123, 50124 n.6 (Aug. 16, 2000). However, *amicus* is not aware of any prior DOJ or DOT order or guidance applying the disparate impact regulations to English-only requirements relating to the public health and safety.

Department – as well as to the Supreme Court of the United States – is available only to those who submit documents in English?

Neither Congress nor the agencies entrusted by Congress to enforce Section 601 by rule, regulation, or order have mandated this anomalous result. Alabama is subject to this ruling only because the lower courts: (1) granted Martha Sandoval and others in her class a private right of action; and (2) assuming the mantle of a Federal regulatory agency under Section 602, equated Alabama's English-language drivers test with national origin discrimination.

While the Court of Appeals determined that Alabama had failed to establish a public safety basis for its English-language practice, *amicus* believes this determination is contrary to reason and logic, regardless of what the lower courts thought of Alabama's showing. Driving a motor vehicle poses everyday risks to the safety of drivers, their passengers, pedestrians, and the occupants of other vehicles. The purpose of requiring would be drivers to pass a test is to reduce the risk that ignorance of the rules or the road will cause an accident. Among the rules of the road is a general rule to observe and obey traffic signs. In Alabama and throughout the United States, these signs are in English. Thus, Alabama's test for obtaining a driver's license is plainly administered in furtherance of the public safety.

A survey of the United States Code and Code of Federal Regulations would reveal more than four hundred references to the English language.[17] While some of these references

[17] These explicit references to the English language in essence reflect the universal practice in the Federal Government that all agency adjudications and rulemaking proceedings are conducted only in English. As the Sixth Circuit stated in *Frontera v. Sindell*, 522 F.2d 1215, 1220 (1975), "It cannot be gainsaid that the common, national language of the United States is English. Our laws are printed in English and our

require the Federal, State or local government, or school or private business, to make reasonable accommodations to those who cannot speak, read, or write the English language, the vast majority of them require applications, records, reports, labels, manuals, and other documents to be submitted in the English language.[18] Thus, in order for a person to participate in an agency rulemaking, seek a determination by a federal agency, or apply for a grant or permit from a federal agency, that person typically must be able to speak, read, and understand English.

Heretofore, these requirements have been upheld against challenges that the failure to provide hearings, instructions, or other notices in the language of one or more non-English speaking persons amounts to a denial of due process. In *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999), the court of appeals held that the failure of the Immigration and Naturalization Service to provide notice of the consequences of Nazarova's failure to appear on time at her deportation hearing in her native Russian did not violate due process. To hold otherwise would present:

> a broad and troublesome position: the logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of

legislatures conduct their business in English." *See* Sen. Hayakawa explaining the purposes and effects of Official English, 127 Cong. Rec. S3998-99 (daily ed. April 27, 1981) (reproduced in Appendix A).

[18] DOT's modal administrations, such as the National Highway Traffic Safety Administration ("NHTSA") and the Maritime Administration, require the English language to be used on labels, *e.g.*, 49 C.F.R. §555.9 (temporary exemption labels), and 49 C.F.R. §571.213 (child restraint systems); in petitions, *e.g.*, 49 C.F.R. §552.4 (petitions for rulemaking, defect, and noncompliance orders), in applications, *e.g.*, 46 C.F.R. §249.6(c) (application for approval of marine hull insurance underwriters), and in tariffs, *e.g.*, 14 C.F.R. §221.4 (tariffs and other documents filed with the Office of the Secretary).

> the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first.

171 F.3d at 483.[19]

Moreover, where public safety is involved, three DOT modal administrations require proficiency with the English language to obtain a permit to operate a vehicle or perform a safety-related function. Even private pilots, the aviation analog to private motor vehicle operators, are required by the Federal Aviation Administration ("FAA") to "read, speak, write, and understand the English language."[20] Coast Guard regulations require "able seamen" to "speak and understand the English language as would be required in performing the general duties of an able seaman and during an emergency aboard ship";[21] other maritime personnel are subject to

[19] *See Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (failure to provide notice of seizure of currency in French rather than English did not violate due process); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983) (failure to provide notice to Social Security claimants in Spanish did not violate due process); *Frontera v. Sindell*, 522 F.2d 1215 (failure to conduct Civil Service Commission exam in language other than English did not violate Constitution).

[20] 14 C.F.R. §61.103. Title 14 of the Code of Federal Regulations requires that an applicant for the following certificates "read, speak, write, and understand the English language": instrument ratings, §61.65; private pilot based on foreign pilot license, §61.75; student pilot, §61.83; recreational pilot, §61.96; private pilot, §61.103; commercial pilot, §61.123; airline transport pilot, §61.153; flight instructor, §61.183; ground instructor, §61.213; flight engineer, §63.31; flight navigator, §63.51; air traffic control tower operator, §65.33; aircraft dispatcher, §65.53; mechanic, §65.71; repairman, §65.101; and parachute rigger, §65.113.

[21] 46 C.F.R. §12.05-3(a).

similar requirements.[22] The Federal Highway Administration ("FHwA") requires drivers of commercial motor vehicles to "read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records."[23]

Other federal agencies with authority to safeguard the public health and safety, such as the Food Safety and Inspection Service of the Agriculture Department,[24] the Consumer Product Safety Commission,[25] the Environmental Protection Agency,[26] the Food and Drug Administration,[27]

[22] *E.g.*, 46 C.F.R. §12.10-3(b) (lifeboatmen); 46 C.F.R. §12.15-3(c) (engine department personnel).

[23] 49 C.F.R. §391.11(b). Similarly, persons who transport migrant workers are subject to the same requirements. 49 C.F.R. §398.3(c). Although the FHwA announced a couple of years ago that it was reviewing this requirement in light of the potential for disparate impact, *see* 62 Fed. Reg. 45200 (1997), no decision has been forthcoming. The fact that the FHwA has authorized administration of the commercial driver's license test in foreign languages, *id.*, does not detract from the fact that the regulation imposes an English proficiency requirement.

[24] *See, e.g.*, 9 C.F.R. §§317.2(b), 381.116(a) (meat and poultry products labeling).

[25] *See, e.g.*, 15 U.S.C. §1261(p)(non-English language label on hazardous substance is "misbranded"); 15 U.S.C. §1278(c)(cautionary statement on toys and games); 16 CFR §300.7 (wood products); 16 C.F.R. §301.3 (fur products); 16 C.F.R. §303.4 (textile fiber products); 16 C.F.R. §307.5 (smokeless tobacco product warnings).

[26] Title 40 of the Code of Federal Regulations includes forty separate provisions requiring labels, reports and other information to be written in English, including 40 C.F.R. §§86.091-35, 86.092-35(a), 86.093-35, 86.094-35, and 86.095-35 (certain cars and trucks); 40 C.F.R. §156.10(a)(3)(pesticides); 40 C.F.R. §204.55-4(a)(4) (portable air compressors).

[27] *See, e.g.*, 21 C.F.R. §101.15(c)(1)(food); 21 C.F.R. §201.15(c)(1) (drugs); 21 C.F.R. §501.15(c)(1)(animal food); 21 C.F.R. §607.40(b) (blood products); 21 C.F.R. §701.2(b)(1)(cosmetics); 21 C.F.R.

and the Bureau of Alcohol, Tobacco, and Firearms,[28] all require labels, reports, and manuals to be written in English.

The DOJ Rules of Practice governing hearings involving allegations of unlawful employment of aliens, unfair immigration-related employment practices, and document fraud require that "all documents presented by a party in a proceeding must be in the English language or, if in a foreign language, accompanied by a certified translation."[29]

Similarly, the rules of this Court provide that all foreign language documents must be accompanied by an English translation.[30]

Amicus is aware of a handful of specific federal requirements, some imposed by regulation and some by statute, directing recipients of federal funds to take affirmative steps to accommodate non-English speaking persons. A survey of the limited number of bilingual programs and activities required or provided by statute or regulation confirms that not one involves matters of the public health and safety. Rather, they are limited to voting rights;[31] access to education opportunities;[32] access to

§801.15(c)(1)(medical devices); 21 C.F.R. §1010.2(b)(electrical products performance certification).

[28] *See, e.g.*, 27 C.F.R. §4.38(c)(wine); 27 C.F.R. §5.33(c)(distilled spirits); 27 C.F.R. §47.52(f)(importation of arms and ammunition).

[29]28 C.F.R. §68.7(e). Also, all submissions to DOJ required by the Foreign Agents Registration Act must be in the English language. 28 C.F.R. §5.206(a). Many agencies expressly require all written submissions to be in the English language. *See, e.g.*, 15 C.F.R. §766.6 (Bureau of Export Administration enforcement proceedings); 35 U.S.C. §361(c)(international patent applications); 17 C.F.R. §230.403(c) (SEC Regulation C registration statement)(one of 22 similar SEC requirements)

[30] Sup. Ct. R. 31 ("Translations").

[31] *See* 28 U.S.C. §§1973b, 1973aa, 1973aa-1a (requiring bilingual voting materials to limited-English proficient persons, but only in States or political subdivisions where more than 5% or more than 10,000 of

employment training opportunities;[33] access to health care services;[34] access to social security and disability programs[35]; access to other social welfare programs;[36] and access to the

voting-age citizens are members of a single language minority and are limited-English proficient). *See also* 32 C.F.R. §46.6(b)(4)(Defense Department rule requiring immediate assistance in "appropriate language" to any person in need of assistance in reading or understanding English).

[32] *See, e.g.*, Bilingual Education Act, 20 U.S.C. §7410 *et seq.*; 34 C.F.R. Part 100, App. B (vocational education remedial plans); 20 U.S.C. §1703 (failure of educational agency to take appropriate action to overcome language barriers that impede equal participation in elementary and secondary schools may constitute a denial of equal educational opportunity on account of national origin).

[33] *See., e.g.*, 29 U.S.C. §1643 (youth training program to overcome serious barriers to employment faced by persons with limited-English language proficiency).

[34] *See, e.g.*, 42 U.S.C. §1396s(c)(distribution of pediatric vaccines with respect to any population of vaccine-eligible children a substantial portion of whose parents have a limited ability to speak English); 42 U.S.C. §300u(b)(bilingual or interpretive services to improve the health of racial and ethnic minority groups); 42 U.S.C. §11707 (health care for native Hawaiians), 42 C.F.R. Parts 51 and 56 (grants for Public Health Service community and migrant health programs and services to include bilingual assistance), 42 C.F.R. §431.635(d)(3)(requiring effective information to those who cannot read or understand the English language regarding the coordination of Medicaid with the Special Supplemental Food Program for Women, Infants, and Children).

[35] *See, e.g.*, 42 U.S.C. §§403(l), 404(b), 423 (Federal Old Age, Survivors and Disability Insurance benefits (Part 404); 42 U.S.C. §1383(c) (Supplemental Security Income for the Aged, Blind, and Disabled); 29 C.F.R. §§2520.102-2(c), 2520.104b-10(e) (notice in non-English language common to plan participants who meet a minimum percentage or number of non-English language literacy in same language, offering language assistance in understanding ERISA plans and disclosure requirements); 29 C.F.R. §4011.10(e)(same for Pension Benefit Guaranty Program plans and disclosure requirements).

[36] *See, e.g.*, 42 U.S.C. §9805 (Urban and Rural Special Impact Programs of assistance to persons disadvantaged in labor market because of limited English language abilities); 7 C.F.R. §272.4(b)(bilingual

court system.[37] There is no similar specific requirement imposed by DOT or DOJ on Alabama or any other State to administer public safety programs in any language other than English or to require the granting of permits to engage in activities with potential risk to the public to those who do not read, speak, or understand English.

The generic English language provision relied upon by the Court of Appeals, 28 C.F.R. §42.405(d), is not reflected in DOT's Title VI regulations or guidance. That regulation, entitled, "Public dissemination of title VI information," requires grant recipients to take "reasonable steps" to provide foreign language assistance where a significant number or proportion of non-English language persons likely to be directly affected by a federally assisted program "need service or information in a language other than English in order effectively to be informed of or to participate in the program." Other than this case, *amicus* doubts that DOJ has relied on this regulation to challenge a State's English language proficiency requirement where the requirement serves a legitimate public health and safety interest.[38]

services to persons of single-language minority for State administration of Food Stamp program); 7 C.F.R. Part 1930, Subpart C, Exh. B (Rural Housing Service lease agreements and occupancy rules written in non-English language "common to a project area").

[37] *See* 28 U.S.C. §1827(c)(interpreters provided in court proceedings when the Director of the Administrative Office of the U.S. Courts determines a need for certified interpreters in a particular language).

[38] We also doubt this regulation would be cited by DOJ for the proposition that Alabama must administer its drivers test in each applicant's native or spoken language, given that what steps are "reasonable" depends on "the scope of the program and the size and concentration of such [non-English language] population," yet this is the clear implication of the 11th Circuit's ruling.

II. *LAU V. NICHOLS* NEEDS CLARIFICATION.

A. *Lau* Is Premised on English Being the Common Language of the United States.

Aside from the obvious safety issues involved in having licensed operators of moving vehicles capable of reading road signs and understanding directions from police, fire, and rescue officers, the importance of understanding English has always been fundamental to American life. The Court should seize this opportunity to acknowledge what the late linguistic expert Senator Hayakawa identified twenty years ago as a fundamental ingredient in the great American melting pot and "what is already a political and social reality: That English is the official language of the United States."[39]

At least half of the United States now have official English constitutional or statutory provisions; most if not all federal and state agencies customarily communicate only in English; and private employers impose English language rules in their workplaces. Although a handful of court cases would indicate otherwise, this linguistic phenomenon is the antithesis of invidious discrimination on the basis of national origin. As explained by Senator Hayakawa, the purpose of official English is "to insure that American democracy always strives to include in its mainstream everyone who aspires to citizenship, to insure that no one gets locked out by permanent language barriers."[40]

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[39] Appendix A at A1. One of the first American Presidents to recognize the need to unify this diverse Nation through our common language was none other than the author of our Declaration of Independence, who in his "Prayer for the Nation," exhorted God to "fashion into one united people the multitudes brought hither out of many kindreds and tongues." "Thomas Jefferson's Prayer for the Nation," reprinted in The Heritage Foundation Quarterly Report (Spring '99) *at* www.heritage.org/ membership/ hmn/ Spring99/ publications.html.

[40] Appendix A at A4.

The only way for an immigrant to profit from everything America has to offer is to learn our common language. The sooner the assimilation, the faster immigrants can empower themselves to function fully as members of American society. It is thus only fitting that an immigrant serves as Chairman and CEO of U.S. English.

Some opponents of official English claim that laws requiring Americans to communicate with their government in English are exclusionary. These claims turn Senator Hayakawa's empowerment purpose, which is still the guiding light of U.S. English, on its head. As this Court correctly pointed out in *Lau*, which involved Chinese-speaking residents of San Francisco receiving "fewer benefits than the English-speaking majority" from the public school system, the solution is not to teach the minority in Chinese, but to "take affirmative steps to rectify the language deficiency," *i.e.*, teach the children our common language.

When opponents of official English, and any courts that accept their arguments, suggest that official English laws are exclusionary, they send an implicit message that immigrants do not need to learn English in order to participate in the opportunities of American life. This misguided view perpetuates a language deficient underclass within the United States of America. Trapped in linguistic ghettos, those who cannot speak or read English will never be full participants in the American "melting pot" experience.

In the preface to his 1828 *American Dictionary of the English Language*, Noah Webster explained the necessity "that the people of this country . . . have an *American Dictionary* of the English Language[:] Language is the expression of ideas; and if the people of one country cannot preserve an identity of ideas, they cannot retain an identity of language." Webster predicted that "our language, within two

centuries, will be spoken by more people in this country, than any other language on earth, except the Chinese." *Id.*

In the last two centuries, English has become the global means of communication. English has more recently become the common language of the World Wide Web. English remains the key to opportunity in America. It empowers immigrants and makes us truly united as a people.

B. *Lau*'s Discussion of Remedy was Confined to the Terms of Federal Guidelines Requiring Affirmative Efforts to Train Non-English Speaking Students to Speak English.

In its brief to the Court of Appeals, the most the United States would say about the federal "law" Alabama is said to have violated was:

> Policies that require fluency in English in order to receive benefits can have a disparate impact on the basis of national origin. The Supreme Court so held in *Lau v. Nichols*, 414 U.S. 563 (1974), and the agencies responsible for implementing Title VI have consistently espoused that view in regulations and interpretive guidance.[41]

These federal "regulations and interpretive guidance" to which the United States referred below are neither express legal authority nor the "Rule of Law."[42]

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[41] Brief for the United States in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), filed January 11, 1999, at 6.

[42] In *Marbury v. Madison*, Chief Justice John Marshall stressed that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. (1 Cranch) 137, 163 (1803). "Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. von Hayek, *The Road to Serfdom* 72 (1944); *see* S. von Pufendorf, VII *De Jure Naturae et Gentuim: Libri Octo* Ch. VI, §11 (1688) (C.H. & W.A. Oldfather trans. 1934) ("Care should be taken that those who rule should govern the commonwealth according to the direction of established laws, rather than by their own private and uncircumscribed pleasure.") (Citation omitted).

The lack of express legal authority for these "regulations and interpretive guidance" is not surprising, given that English-language requirements are prevalent throughout the Federal Government. It is also not surprising, given the difficulty, if not impossibility, with crafting a remedy that accommodates the non-English speaking persons but neither compromises the public health or safety nor imposes unreasonable burdens on the grant recipient. Here, the only remedy ordered by the District Court, in an order granting a stay pending appeal, was to require Alabama to administer the driver's test in seven languages other than English.[43] If it indeed is a violation of Title VI to administer a driver's test to a non-English speaking person in English, there is no principled limit to this ruling. If there is only one person who speaks a particular language in the entire State of Alabama, or perhaps five or ten, why would they not be entitled to take the test in their own native language?[44]

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[43] The district court initially ordered Alabama to make "reasonable accommodations" to non-English speaking applicants, without specifying what accommodations would suffice.

[44] *Cf. Lau v. Nichols*, 414 U.S. at 572 (Blackmun, J., and Burger, C.J., concurring in the result)("I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.").

C. *Lau* Should Only Be Applied as Controlling Authority to Strike Down a State Law, If at All, Where There Is a Clear Congressional Statement of a Condition Sought to Be Imposed on the Receipt of Federal Funds.

"Congress attaches conditions to the award of federal funds under its spending power, U.S. Const., Art. I, §8, cl. 1[.]" *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 287 (1998). When the Court decided *Lau*, it mentioned but did not define any restrictions on the "spending power" of Congress: "Whatever may be the limits of that power, . . . they have not been reached here." 414 U.S. at 569 (internal citations omitted). Since deciding *Lau*, as discussed below, the Court has addressed "spending clause" restrictions, at least implicitly in the context of construing statutory ambiguities. *Amicus* respectfully urges the Court to clarify its ruling in *Lau* in light of its subsequent ruling that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)(citations omitted).

As there is no clear congressional statement that receipt of DOT funding forbids Alabama from offering its drivers license test only in English pursuant to its 1990 constitutional amendment mandating that "The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. . . ." [45] *Lau* cannot be controlling authority.

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[45] Ala. Const. amend. 509.

IV. WHEN SPENDING CLAUSE LEGISLATION FUNCTIONS AS A QUASI-CONTRACT BETWEEN CONGRESS AND A STATE, ANY AMBIGUITIES SHOULD BE CONSTRUED *CONTRA PROFERENTEM*, *I.E.*, AGAINST CONGRESS

The 11th Circuit's holding that when "Spending Clause legislation functions as a quasi-contract between Congress and the States . . . , agency regulations are accorded substantial deference in assessing whether they outline a permissible construction of a congressional statute's purpose," 197 F.3d at 495, is contrary to the rule of quasi-contractual statutory construction applied by this Court in *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806), that ambiguous words be construed *contra proferentem*, as well as contrary to two related rules of construction applied by this Court recently in a federalism statutory construction context. *Vermont Agency*, 120 S. Ct. at 1870.

A. Quasi-Contractual Ambiguities in Title VI Ought to Be Construed Against Congress.

Federal "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is either unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17 (citations omitted).

In *Heth*, a customs duties collector challenged the retroactive application of a statutory reduction of his commission level. The Attorney General claimed that the

new rate should apply to all duties collected after the effective date of the statute. The Customs collector claimed entitlement to the previous statutory commission level on the grounds that Congress' statutory reduction of his commission was ambiguous as to what "point in time" it should take effect. Justice Johnson explained:

> The words of the act, "arising on goods imported," although in themselves very indefinite in point of time, will receive a precise signification in this respect, by supplying the words "heretofore," to give them a past, or "hereafter," to give them a future signification. If it be necessary that the court should make an election between these words, in order to complete the sense, its choice will be immediately determined by recurring to two well known rules of construction, [namely,] that it ought to be consistent with the suggestions of natural justice, and that the words should be taken most strongly "*contra proferentem*."

7 U.S. (3 Cranch) at 409; *id.* at 413 (Paterson, J.) ("[T]he words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law makers."); *cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J. & Thomas, J., concurring in the judgment in part and dissenting in part) ("[A]ny ambiguity concerning [a preemption clause's] scope will be read in favor of preserving state power.").[46]

At least five Justices have recently reaffirmed the precedential value of *Heth*, for this Court's long-standing

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[46] *See generally Mesa Air Group, Inc. v. DOT*, 87 F.3d 498, 506 (D.C. Cir. 1996) (buttressing the appellate court's federal government-private party contractual analysis with *contra proferentem*).

recognition of "the injustice of interpreting a statute to reduce the level of compensation for work already performed," *Martin v. Hadix*, 527 U.S. 343, 368-69 (1999) (Ginsburg, J., and Stevens, J., concurring in part and dissenting in part), and for "the meaning of the 'clear statement' retroactivity rule from the earliest times." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278-88 (1994) (Scalia, J., Kennedy, J., and Thomas, J., concurring in the judgments).

In this case, the Title VI contractual language which allegedly imposes a legal proscription against implementing Alabama's official English constitutional amendment, at least with regard to drivers license testing, is reproduced in Appendix B in its entirety.[47] In summary, the grant assurance language mirrors the nondiscrimination language of Title VI, and incorporates by reference DOT's "specific requirements."

No reasonable State official would understand these grant assurances as a consensual exposure by a State to "private attorney general" lawsuits alleging disparate impact or any other form of unintentional discrimination. *Amicus* respectfully suggests that when this Court focuses on the legislative intent behind Section 602 as applied to these specific grant assurances in this case, the question presented by the Alabama Petitioners, as urgent as it is for this Court to resolve, answers itself: "The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States."

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[47] *See* 49 CFR §21.7(a)(1) ("Every application for Federal financial assistance to carry out a program to which this part applies, . . . shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by, an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part.").

Pennhurst, 451 U.S. at 16-17. "Our conclusion is buttressed by two other considerations that we think it unnecessary to discuss at any length: first, 'the ordinary rule of statutory construction' that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute,' and, second, the doctrine that statutes should be construed to avoid difficult constitutional questions." *Vermont Agency*, 120 S. Ct. at 1870 (citations omitted).

B. Ambiguities in Spending Clause Legislation Should Not Be Construed to Impinge Upon Powers Reserved to the States Respectively.

The Spending Clause remains a significant exception to the rule that the Federal Government "may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). In *Pennhurst*, this Court recognized "the 'constitutional difficulties' with imposing affirmative obligations on the States pursuant to the spending power. That issue, however, is not now before us." 451 U.S. at 17 n.13 (citation omitted). At least one such unresolved "constitutional difficulty" is squarely presented in this case: "[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000); s*ee Loving v. United States*, 517 U.S. 748, 771 (1996) ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.") (citations omitted).

As of this Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), *United States v. Butler*, 297 U.S. 1 (1936),

was "the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause." 483 U.S. at 216 (O'Connor, J., dissenting). In *Butler*, Congress through the Agricultural Adjustment Act had attempted to regulate through the spending power. *See id.* The Court's analysis in *Butler* came down to a fundamental federalism analysis, equally applicable in this case: "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." 297 U.S. at 63.

In dissent in *South Dakota*, Justice O'Connor, while "subscrib[ing] to the established proposition that the reach of the spending power 'is not limited by the direct grants of legislative power found in the Constitution,'" 483 U.S. at 212-13 (quoting *Butler, 297 U.S. at 66*), also identified two essential attributes of a legitimate exercise of the spending power: "the conditions imposed must be unambiguous"; and "the statute is entirely unambiguous." 483 U.S. at 213 (citations omitted). In this case, both the conditions and the statute are at best ambiguous. Neither Title VI nor the DOT's implementing regulations even hint that Alabama's English-only drivers license testing policy violates Title VI.

The only Federal regulations arguably unambiguous on this issue are EEOC's "English-only rule Guidelines,"[48] guidelines that the 9th Circuit rejected in *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993), and the 4th Circuit has called into question.[49]

The Court applied its *Butler* federalism analysis to strike down the Low-level Radioactive Waste Policy Amendments of 1985 as crossing the "line distinguishing encouragement

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[48] 29 C.F.R. §1606.7(a).

[49] *Long v. First Union Corp. of America*, 894 F. Supp. 933 (E.D. Va. 1995) ("This Court . . . does not find the language of Title VII supportive of the EEOC's conclusion."), *aff'd* 86 F.3d 1151 (4th Cir. 1996).

from coercion." *New York v. United States*, 505 U.S. 144, 175 (1992). "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require States to regulate." *Id.* at 178.

Although *Butler* and *New York* both involved coercive acts of Congress, the *Butler/New York* analysis applies equally to coercive acts of federal agencies and courts: "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people" 297 U.S. at 63 (*quoted in* 505 U.S. at 157); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) ("[T]he framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. . . . [C]ourts, as well as other departments, are bound by that instrument."). *Amicus* respectfully suggests that the people have never given the Federal Government the power to frustrate Alabama's efforts to empower all of its citizens through nondiscriminatory policies that encourage facility in our common language, English, such as the State constitutional provision and sound policies underlying Alabama's English language drivers license testing practice.

CONCLUSION

Accordingly, this Court should reverse the 11th Circuit.

Respectfully Submitted,

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APPENDICES

APPENDIX A

SENATOR S.I. HAYAKAWA ON THE PURPOSE AND EFFECTS OF OFFICIAL ENGLISH
27 CONG. REC. S3998-99
(DAILY ED. APRIL 27, 1981)

[L]anguage is a powerful tool. A common language can unify; separate languages can fracture and fragment a society. The American "melting pot" has succeeded in creating a vibrant new culture among peoples of many different cultural backgrounds largely because of the widespread use of a common language, English.

Learning English has been the primary task of every immigrant group for two centuries. Participation in the common language has rapidly made available to each new group the political and economic benefits of American society. Those who have mastered English have overcome the major hurdle to full participation in our democracy.

Today I am introducing a constitutional amendment declaring as the law of the land what is already a political and social reality: That English is the official language of the United States.

This amendment is needed to clarify the confusing signals we have given in recent years to immigrant groups. For example, the requirements for naturalization as a U.S. citizen say you must be able to "read, write, and speak words in ordinary usage in the English language." And though you must be a citizen to vote, some recent legislation has required bilingual ballots in some areas. This amendment would end that contradictory, logically conflicting, situation.

Bilingual education programs were originally designed to help non-English-speaking children learn English quickly so they could join the mainstream of education and of our society. The Carter administration attempted to substantially

broaden this mandate by proposing requirements for schools to teach other academic subjects entirely in students' native language.

I am proposing this amendment because I believe that we are being dishonest with the linguistic minority groups if we tell them they can take full part in American life without learning the English language. We may wish it were otherwise, but it simply is not so. As the son of an immigrant to an English-speaking country, I know this from personal experience. If I spoke no English, my world would be limited to the Japanese-speaking community, and no matter how talented I was, I could never do business, seek employment, or take part in public affairs outside that community.

Let me explain what the amendment will do, upon its passage by Congress and ratification by three-fourths of the States:

It will establish English as the official language of State, Federal, and local government business;

It will abolish requirements for bilingual election materials;

It will allow transitional instruction in English for non-English speaking students, but do away with requirements for foreign language instruction in other academic subjects;

It will end the false promise being made to new immigrants that English is unnecessary for them.

On the other hand, and this is important, there are things the amendment will not do:

It will not prevent the use of any other language within communities, churches, or cultural schools.

That is, Yiddish schools, Hispanic schools, Japanese, and Chinese schools are perfectly all right insofar as their support by local communities, but not by the taxpayer.

It will not prevent the use of second languages for the purpose of public convenience and safety, for example on signs in public places, but it will not allow governments to require multilingual postings or publications.

I am thinking, Mr. President, of such signs as you see in the street sometimes, "Danger, construction area." If this sign is put up in a building lot in Chinatown, let us say, there is certainly no objection whatsoever to putting signs to that effect in Chinese or any other language that is appropriate for the passerby. So, for purposes of public convenience and safety, other languages may be used wherever necessary. I think that what we have, in Washington, Los Angeles, and San Francisco, street signs in Chinese or Japanese, are perfectly acceptable, because they are also accompanied by street signs in English. They are also acceptable because they give a cosmopolitan flavor to those cities that have them and we are proud of the fact that we are a cosmopolitan culture.

My amendment, Mr. President, will not prevent public schools from offering instruction in other languages, nor will it prevent schools and colleges from requiring some study of a foreign language.

Incidentally, Mr. President, we are crippled in international relations because of our imperfect command not only of the well known languages like Spanish, French, German, or Italian, but we have very few speakers of Chinese, Japanese, Russian, Hungarian, Arabic, Thai -- some languages some people here ought to know so they can serve our Nation intelligently in diplomatic service or in trade. If we have a huge trade deficit vis-à-vis Japan, for example, it is because they have some Japanese salesmen speaking

English in New York, Chicago, Los Angeles, and elsewhere, but we have very, very few Japanese-speaking Americans doing a selling job in Tokyo or Osaka.

So, at the same time that I declare English to be the official language of the United States, I am not trying to discourage foreign language studies.

The ability to forge unity from diversity makes our society strong. We need all the elements, Germans, Hispanics, Hellenes, Italians, Chinese, all the cultures that make our Nation unique. Unless we have a common basis for communicating and sharing ideas, we all lose. The purpose of this proposal is to insure that American democracy always strives to include in its mainstream everyone who aspires to citizenship, to insure that no one gets locked out by permanent language barriers.

APPENDIX B

"General Provisions for MCSAP Agreement"
Grant Agreement between the Federal Highway Administration and Alabama Department of Public Safety
(Exhibit I to Alabama Summary Judgment Memorandum)

10. Civil Rights Act: The recipient shall comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352), and in accordance with Title VI of that Act, no person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied that benefits of, or be otherwise subjected to discrimination under any program or activity for which the recipient received Federal financial assistance and shall immediately take any measures necessary to effectuate this Agreement. It shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) prohibiting employment discrimination where:

(a) The primary purpose of and instrument is to provide employment, or

(b) Discriminatory employment practices will result in unequal treatment of persons who are or should be benefiting from the grant-aided activity.

11. Nondiscrimination: The applicant/recipient hereby agrees that, as a condition to receiving any Federal financial assistance from the Department of Transportation, it will comply with Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. 2000d), related nondiscrimination statutes, and applicable regulatory requirements to the end that no person in the United States shall, on the grounds of race, color, national origin, sex, handicap or age, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any

program or activity for which the applicant/recipient receives Federal financial assistance. The specific requirements of the United States Department of Transportation standard Civil Rights assurances with regard to the States' highway safety programs (required by 49 CFR 21.7 and on file with the U.S. DOT) are incorporated in this grant agreement.